

★ DEC 16 2005 ★

BROOKLYN OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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STEPHEN SAMUEL ALLEN,

Petitioner,

-against-

DANIEL SENKOWSKI,

Respondent.  
-----X

MEMORANDUM  
ORDER  
AND  
JUDGMENT  
97 CV 2413  
(JBW)

JACK B. WEINSTEIN, Senior United States District Judge

Petitioner filed his application for a writ of habeas corpus on April 4, 1997. A number of counsel were appointed for him by this court. A hearing was held in this court on November 7, 2001.

On December 26, 2001 the petition was denied. A certificate of appealability was granted by this court. *See Allen v. Senkowski*, 178 F. Supp. 2d 318 (E.D.N.Y. 2001). After it expanded the certificate, a mandate affirming the dismissal was filed in this court by The Court of Appeals on August 19, 2004. *See* 97 Fed. Appx. 346 (2d Cir. 2004).

By affidavit dated June 15, 2005 the petitioner moved to set aside the judgment of dismissal pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. His motion was supported by a brief from his counsel dated November 16, 2005. The affidavit and brief reiterate the arguments rejected by this court and the Court of Appeals for the Second Circuit.

Respondent opposed the motion by affirmation and brief dated November 22, 2005. The affirmation accurately states the procedural history at paragraphs 4-34 and is incorporated in this

memorandum by reference.

An evidentiary hearing was conducted on December 13, 2005. The parties were represented by counsel. Petitioner was present by telephone.

No witness, affidavit or evidence was produced. No legal or factual argument not already considered by this court and the Court of Appeals on the original petition and appeal was presented. No evidence of any possible new testimony by any alibi witness was offered. No possible prospective alibi testimony suggested would have affected the jury's finding.

Petitioner argued forcefully on his own behalf that the Court of Appeals misread its own decisions in affirming dismissal of the petition. Since the affirmance in 2004 amounted to law of the case this argument is not one the district court can entertain. In any event, it is not persuasive.

The motion is denied for the reasons stated above and more fully orally.

A certificate of appealability is denied if one is required for appeal. There is no constitutional or other issue warranting an appeal.

SO ORDERED.

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Jack B. Weinstein  
Senior United States District Judge

Dated: December 15, 2005  
Brooklyn, N.Y.